

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRANDEIS UNIVERSITY and)	Docket No. 12 C 1508
GFA BRANDS, INC.,)	
)	
Plaintiffs,)	
)	
v.)	Chicago, Illinois
)	October 18, 2012
EAST SIDE OVENS, INC.,)	9:30 o'clock a.m.
et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS - STATUS, MOTIONS
BEFORE THE HONORABLE RICHARD A. POSNER

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1 (Proceedings had in open court:)

2 THE CLERK: 12 C 1508, Brandeis University versus East
3 Side Ovens, Inc. Please be seated.

4 THE COURT: Good morning, everybody.

5 So we are here to discuss the motion to compel,
6 motions, and responses and so on. So let me begin. I have
7 some questions for Brandeis. So why don't we --

8 MS. NOEL: Your Honor, Kristin Noel on behalf of the
9 plaintiffs.

10 THE COURT: Well, you want to go to the --

11 MS. NOEL: Absolutely.

12 THE COURT: Is there a podium?

13 MS. NOEL: Absolutely.

14 THE COURT: So you want to state your name.

15 MS. NOEL: Kristin Noel, N-o-e-l, from Quarles &
16 Brady, appearing on behalf of Brandeis and GFA. Good morning,
17 your Honor.

18 THE COURT: Yes. So I am looking first at your
19 request for a narrative or correlation short linking recipes to
20 products. What is the purpose of this?

21 Now, what you want -- now, do you have the records,
22 and you just want the narrative? Or do you -- what do you need
23 the records to?

24 MS. NOEL: The short answer, your Honor, is, we would
25 like the records to the extent they exist as well, generally

1 speaking. But on certain particular issues, if the defendants
2 make representations, for example, that the formulation has not
3 changed over time and we can use the representative document
4 and that will correlate to all the products manufactured and
5 sold in any particular time period, we would accept that
6 representation.

7 The purpose, getting to your first question, your
8 Honor, is, you know, we need to establish a damages base. The
9 defendants have asserted at various points in this litigation
10 that plaintiff should not be allowed to rely, for example, on
11 one or two tasks of their products at any given snapshot in
12 time, because they may have changed their formulations over
13 time. So to establish liability and the full spectrum of
14 damages, we need to know what formulations were used when, and
15 what their sales were for that time period.

16 THE COURT: Why is that relevant to liability?

17 MS. NOEL: Well, for example, your Honor, if we take
18 Keebler, one of the cookie defendants, one of the claims
19 asserted against them is the use of the margarine in the
20 cookie. And so we need to look to their manufacturing process
21 and determine, in fact, and make -- come forward with proof
22 that there is, in fact, a margarine being used in that cookie.

23 THE COURT: But you don't need quantities for that?

24 MS. NOEL: Quantities --

25 THE COURT: You just need one cookie, don't you?

1 MS. NOEL: We believe we just need one cookie. But --

2 THE COURT: For liability, yes.

3 MS. NOEL: Yes. But if defendants are going to claim,
4 for example, that they changed their formulation and expect an
5 offer of proof from plaintiffs, particularly if they want --

6 THE COURT: No, then you want another. Right. You
7 want one cookie with each recipe, right? For each recipe, for
8 each different recipe, you want a cookie.

9 MS. NOEL: That's correct.

10 THE COURT: That's for liability. Okay.

11 Now, for damages, for damages you want to have their
12 sales of every different -- every cookie with a different
13 recipe. You want the sales of those cookies.

14 MS. NOEL: Correct, your Honor.

15 THE COURT: How much of that information has -- forget
16 the narrative. But how much of those data have they produced?

17 MS. NOEL: It's different by defendant, your Honor.
18 We have been provided very little data from Unilever and
19 Conopco that we can make sense of. They certainly now provided
20 I believe it's about 400 representative documents that
21 supposedly we can review and infer and correlate a SKU number
22 to a formulation, and then we can take that information and
23 compare it to their sales figures.

24 We have been unable to do so. We do believe that
25 defendants generated these documents in the ordinary course of

1 business, and that they have a very good understanding of
2 what -- what products they're selling to the public.

3 Defendant Keebler, we do recently have acquired much
4 more information. It's not a complete package. But, for
5 example, they point to their operating manuals, and they point
6 to specific Bates numbers and say, here are the SKU numbers.

7 The problem we have with that is, we've compared their
8 operating manuals to their sales documents and their
9 nutritional labeling documents, and there are other SKUs. So
10 there are other at least numbers associated with other batches
11 of the accused products that aren't indicated on the operating
12 manuals.

13 We've asked them to represent that we can take all of
14 the SKUs for, let's say, cookie X and ask them to represent
15 that we can look just at that operating manual. But we haven't
16 gotten that clarity.

17 THE COURT: But so what you would like ideally would
18 be a list of all the different cookie recipes by defendant and
19 all the sales of cookies they had made of using that recipe.

20 MS. NOEL: Yes.

21 THE COURT: So is that their sales or retail sales.
22 That you want?

23 MS. NOEL: Your Honor, that would be their sales.

24 THE COURT: Their sales.

25 And what would then be the theory of damages? I mean,

1 suppose they have sold -- I don't know what the units of --
2 they sold say a thousand cookies using a recipe which, say, is
3 found to infringe. So then how do you calculate damages from
4 that?

5 MS. NOEL: For a cookie, your Honor, it's mostly
6 likely a reasonable royalty. And so we would -- you know,
7 we're obviously working with our expert, damages expert, and
8 our economist right now to come up with an appropriate
9 reasonable royalties using the factors provided by the Federal
10 Circuit. And so it would be a royalty.

11 THE COURT: Factors like what?

12 MS. NOEL: The value or desire by the purchasing
13 public for a cookie that is -- has no trans fat, for example,
14 and has the fat profile such that you can --

15 THE COURT: How do you determine -- how do you
16 attribute sales to a particular component?

17 MS. NOEL: Well, I don't have the full universe for
18 your Honor today. But I might suggest that their marketing
19 materials, for example, if they're promoting their cookie as
20 trans fat free and having no cholesterol, that is attributable
21 to the fat blend that is used in the cookie.

22 And so --

23 THE COURT: No, no, the question is, people buy a
24 cookies for a variety of reasons. So one might be the
25 cholesterol. But how would you figure out what sales or

1 revenues, revenue rather than physical output, was attributable
2 to the advertising of the cholesterol rather than taste of the
3 cookie or --

4 MS. NOEL: Sure. Sure. And those concepts, your
5 Honor, are related. If you change the cholesterol profile such
6 as it's perfectly healthy, you're going to end up with a bad-
7 tasting cookie. The beauty of the blend that is patented by
8 Brandeis and licensed to GFA is that you have a good-tasting,
9 good-feeling cookie that is still -- does not negatively impact
10 the cholesterol profile in the body and is trans fat free.

11 We are pulling a wealth of information from various
12 data collectors, such as Nielsen, for example, that study why
13 consumers buy certain products. Companies such as Smart
14 Balance and the defendants also do on their own as their
15 ordinary course of business surveys of the public. What is
16 important? Is this patented feature important?

17 And so our experts will draw from all of those sources
18 of data and do comparative, for example, to non-infringing
19 alternatives. And --

20 THE COURT: Do they -- have you collected from them,
21 gained from them in discovery, their internal studies of the --
22 presuming they may do some cause to this cholesterol-altering
23 ingredient. So have you gotten their internal documents in
24 which they explain why it's worthwhile investment, what they
25 expect in way of additional sales or additional revenues?

1 MS. NOEL: We have, your Honor, received some limited
2 documents that I would consider directed towards that issue.
3 We are starting the 30(b)(6) depositions next week. I believe
4 we have no less than five that we are taking on Tuesday, for
5 example. And some of the topics are directed to those
6 questions, those very questions.

7 THE COURT: Okay. Well, thank you.

8 Let me hear now from the defendants about this, the
9 plaintiffs' request for the narrative or the correlation.

10 MR. ASSMUS: Good morning, your Honor. Richard Assmus
11 on behalf of Nestle USA and Keebler Company. That's
12 A-s-s-m-u-s.

13 Your Honor, the motion was brought just against
14 Keebler Company.

15 THE COURT: I'm sorry. You represent who?

16 MR. ASSMUS: Nestle USA and Keebler.

17 Your Honor, of those two clients, only Keebler was the
18 subject of the motion to compel, as you know, also Unilever and
19 Bremner, several other defendants. But Nestle was not a
20 subject of the motion.

21 THE COURT: Okay. So Brandeis is entitled to, you
22 know, have information about -- about the number of sales or
23 the sales revenues, I guess, from each recipe, right?

24 MR. ASSMUS: Yeah, we do not disagree with that, your
25 Honor. We have produced a number of things bearing on that.

1 We produced the nutritional label information.

2 THE COURT: What do you mean? Why can't you just give
3 her a list of all the recipes and next to recipes how many or
4 what cookie revenues were derived from the cookies that were
5 based on that recipe?

6 MR. ASSMUS: We believe we have produced exactly that
7 information, your Honor. Spreadsheets of sales by SKU number.
8 The SKUs are then correlated to recipes through the operating
9 manuals.

10 I think part of what's going on --

11 THE COURT: Well, how am I supposed to reconcile --
12 how am I supposed to decide between you and Ms. Noel, who says
13 she hasn't received all this information? What am I supposed
14 to do?

15 MR. ASSMUS: I think, your Honor, the plaintiffs were
16 somewhat premature in filing the motion in that we were
17 discussing these things. I think part of what's going on here,
18 your Honor, is that our executives actually know the documents.
19 They're looking at them cold. We understand they need some
20 help in understanding how the things match up, how the
21 company's internal processes are for labeling SKU numbers. For
22 example, you might have a cookie that sold under one SKU
23 number. But then during Halloween, you know, it sold with a
24 pumpkin on it and given a separate SKU.

25 We understand they may need some help correlating

1 those things. We believe, your Honor, that's probably best
2 solved by discussions between counsel, which were ongoing at
3 the time they filed the motion, as well as the depositions that
4 they noticed up.

5 In fact, Keebler's 30(b)(6) witness on both recipes
6 and damages are set for tomorrow and October 23. We would
7 expect that through that information and working together with
8 counsel further, we should be able to answer their questions
9 about -- about the correlation.

10 THE COURT: Well, I don't understand. Why can't you
11 just give them a list with all the recipes on the left, and on
12 the right the sales of cookies for each of the recipes?

13 MR. ASSMUS: We can give them that, your Honor. We
14 can. And we believe we've given that information. They may
15 have trouble --

16 THE COURT: Why don't you just give them, you know,
17 two columns. One has the recipes, one has the sales.

18 MR. ASSMUS: Your Honor, we can put that together.

19 THE COURT: Okay. Okay. Thanks. Let me move -- let
20 me move on to a second position, also involving Keebler. I
21 think this is the same question. The first point was Brandeis'
22 request for this narrative or correlation short. But if you
23 provide, you know, this table I'm suggesting with the recipes
24 on one side and the sales on the other, that I think satisfies.

25 Is that what you are looking for, Ms. Noel?

1 MS. NOEL: Yes, your Honor, with the caveat that the
2 recipe can't just be a list of ingredients, but it has to be
3 the actual manufacturing process.

4 THE COURT: What do you mean?

5 MS. NOEL: They have, for example, an operations
6 manual that it's a little high level. But if they could just
7 say for these SKU numbers look to this manual, we would be
8 satisfied with that.

9 THE COURT: Okay. So you want the recipe, but you
10 also want the process by which the recipe is translated into
11 the product.

12 MS. NOEL: That's correct, your Honor.

13 THE COURT: Is that feasible?

14 MR. ASSMUS: Yes, your Honor. We produced the actual
15 manual that's used in the plant to make the cookie. There is
16 at this point for Keebler just three cookies accused, your
17 Honor. Vanilla Wafers, Mini Vanilla Wafers and Chocolate Chip
18 Lovers Chips Deluxe. We produced those operating manuals, and
19 those operating manuals, your Honor, contain historical
20 information about the change history of those operating
21 manuals. That's what I would call the bible, your Honor, by
22 which a factory actually makes the cookies.

23 It -- we've also produced nutritional label
24 information with respect to each of those cookies that tell
25 them all the ingredient?

1 I should point out, your Honor, the reason we think
2 that the process information -- or we think they think the
3 process information is relevant is, as you know, your Honor,
4 the '192 patent is a patent on a margarine, and we sell
5 cookies. And, in fact, the fat that Keebler puts into its
6 cookies is not a margarine. It's what's called a shortening.
7 It's not emulsion as required by your Honor's claim
8 construction.

9 Or so we believe that somehow they think not that we
10 buy a margarine and not that we sell a margarine, but at some
11 point in the processing of a cookie maybe a margarine is
12 created. That's I think one of the reasons, the pretty tenuous
13 link here, your Honor, between their patent and potential
14 damages.

15 But just -- that's by way of background why this
16 processing information may be relevant. In fact, we produced
17 it.

18 THE COURT: So you are going to produce -- so you are
19 going to give a list of recipes and the sales for the cookies
20 for each -- made from each recipe. And Brandeis has this
21 operating manual by which they can associate each of these
22 recipes with a production process.

23 MR. ASSMUS: That's correct. In fact, your Honor, the
24 operating manual contains a list of SKUs that match up the
25 operating manual with --

1 THE COURT: A list of what?

2 MR. ASSMUS: A SKU, it's S-K-U, pronounced SKU. I
3 confess I don't know what the abbreviation stands for. It's a
4 retail term to determine a particular cookie that's sold in a
5 store. It's -- you might think of it as the bar code that you
6 get scanned at the grocery store, the way sales of a particular
7 format of a cookie are tracked.

8 THE COURT: Okay. So I think that should take care of
9 -- how long will it take to furnish this?

10 MR. ASSMUS: I think it's -- we can furnish it very
11 quickly, your Honor. I -- we obviously need to talk to the
12 client about the information. I don't think it should be more
13 than a matter of days before we can put that information
14 together. In fact, we think it's just a matter of collating
15 the information. The documents we already provided to them.

16 THE COURT: Okay. Thanks.

17 Is that satisfactory, Ms. Noel?

18 MS. NOEL: It is welcome, your Honor. I do note that
19 the 30(b)(6) on liability is tomorrow. And the damages I
20 believe is next week Friday. So the sooner we get that
21 information, there will be fewer disputes, for example, on
22 reconvening those depositions.

23 MR. ASSMUS: Your Honor, we will endeavor to do it as
24 soon as possible, as well as make sure they have an opportunity
25 to walk through those questions with our witness.

1 THE COURT: Okay. Thank you.

2 Okay. The next issue I have on my list is the
3 question involving Conopco. And as I understand, Brandeis'
4 concern is, there is an exhibit which lists something called
5 MIX ICB Light VTF Oil Phase as ingredient, and a margarine
6 called I Can't Believe It's Not Butter. And I guess Brandeis
7 wants to have the component oils disclosed, is that correct,
8 Ms. Noel?

9 MS. NOEL: We would like the similar information as to
10 what Keebler just provided. Keebler's operating manuals are --
11 were far easier for a third party to decipher than, for
12 example, Unilever and Conopco.

13 We don't have any consolidated documents. We don't
14 even have set universe of documents that show their ingredients
15 and their manufacturing process. They've identified
16 approximately 400 exemplar documents for us to review. They
17 are big spreadsheets and reports. They are to an outsider not
18 decipherable.

19 So we would request the same information that Keebler
20 has just agreed to provide from Unilever and Conopco.

21 THE COURT: Thank you.

22 So, yes. Someone want to speak for Conopco?

23 MR. MATHIAS: Good morning, your Honor. Edward
24 Mathias on behalf of Unilever and Conopco.

25 Your Honor, what we can provide is the identifying

1 number for the formulation, and match that to individual sales
2 that were made throughout the relevant time period. We are
3 happy to provide that. And if that satisfies plaintiffs'
4 request, then I think that settles the matter.

5 THE COURT: Will that show the ingredients in this,
6 the actual oils that are in this MIX ICB?

7 MR. MATHIAS: The -- that spreadsheet that we would
8 create could not show that. If I could explain your Honor,
9 Exhibit C and D attached to our papers have an identifying
10 number that provide -- that list all of the ingredients. And
11 these are the documents that we have pointed to that set forth
12 in our production what the ingredients are for these
13 formulations, which have changed over time. But there is an
14 identifying number that they are -- they can be provided and
15 they have been provided, from which they can determine all of
16 the ingredients.

17 THE COURT: And where is that document?

18 MR. MATHIAS: It's Exhibit C and D to our -- to our
19 opposition. Exhibit C is colorfully titled, BOM Explosion.
20 And Exhibit D is a -- what's called an Innerspec data sheet,
21 which contains all the relevant information they need to
22 determine the date on which the formulation was operative and
23 the corresponding number that we can then link to sales.

24 So we have provided all of the relevant information to
25 the plaintiffs. And we're happy to provide a spreadsheet that

1 links this formulation number to the actual sales to the
2 retailers.

3 THE COURT: So you are saying that these two exhibits
4 actually list the oils that are in your product?

5 MR. MATHIAS: Yes, your Honor.

6 THE COURT: Okay. Then let me ask Ms. Noel whether
7 she has everything she needs.

8 MS. NOEL: Your Honor, we have been provided with a
9 chart of approximately 400 Bates numbers that contain documents
10 similar as to these. And we are told they are examples from
11 their production of approximately 5 million documents. That we
12 should go document by document and try to correlate not just
13 the ingredient list.

14 We need the manufacturing process. And we need date
15 certain. This went into production on such and such --

16 THE COURT: But let me just understand. Do you know
17 what oils are in this, in each of these products?

18 MS. NOEL: If I had this document for each and every
19 different SKU, I would believe counsel's representation that
20 all the ingredients are listed on here. A lot of this
21 information is in shorthand. It was designed by them for
22 internal use, not for our use.

23 It would be incredibly time-consuming and involve a
24 lot of guesswork for us to go document by document, looking at
25 these, figuring out the ingredient list, and then correlating a

1 manufacturing process from it.

2 The dates that they list too on most of these
3 documents are one date. We asked them, is that the date it
4 first became -- you first produced? When is the end date?
5 We're not provided with that information. In fact, all the
6 dates we're told are estimates.

7 This -- when you balance the hardships on Unilever
8 Conopco compared to Brandeis in trying to decipher these
9 hundreds of documents, your Honor, we don't think this
10 adequately meets the standard in 33(d), and we again request
11 some --

12 THE COURT: So this is -- so you want the same
13 information that you want from Keebler?

14 MS. NOEL: Yes, your Honor.

15 THE COURT: The recipe, the sales per recipe, and an
16 operating manual, which enables you to figure out the
17 production process for each --

18 MS. NOEL: Right.

19 THE COURT: -- of the recipes.

20 MS. NOEL: Along with the dates would be helpful. But
21 exactly how your Honor summarized, that's the information we
22 would request.

23 THE COURT: So, Mr. Mathias, why can't she have that?

24 MR. MATHIAS: Your Honor, we would undertake the same
25 process that they would to -- to provide the information that

1 they're asking for. And under 33(d) the burdens are
2 substantially equivalent. And, therefore, it's all there.

3 THE COURT: I don't understand that. Surely it is
4 easier for you to summarize and make inferences and so on from
5 your own documentation than it is for an outsider.

6 MR. MATHIAS: Your Honor, these documents, Exhibit C
7 and D, are form documents that are provided in the production.
8 If I can direct your Honor to --

9 THE COURT: But what she wants is, she wants the
10 recipes. She wants the number of sales per recipe, date, and
11 some key enabling her to connect each of the recipes with the
12 process by which the product is manufactured. So why don't you
13 provide it the way Keebler is providing it?

14 It's easier for you to provide it than for them to try
15 to figure out what these documents are. They are your
16 documents.

17 MR. MATHIAS: Your Honor, we can provide them a number
18 that corresponds to the sale.

19 THE COURT: Look, you provide them the same
20 information that Keebler is going to provide.

21 MR. MATHIAS: We're happy to do that, your Honor. And
22 as far as -- can I speak to the manufacturing --

23 THE COURT: You do it identically the way Keebler is
24 going to do it.

25 MR. MATHIAS: That would be fine, your Honor.

1 THE COURT: Thank you.

2 Now, next I have a question about Bremner. So
3 Bremner, this is about its pre-electronic records. And
4 Bremner's response to the motion, it's a good response and
5 implausible, explaining, you know, a lot of difficulties in
6 dealing with all these documents that apparently are not, you
7 know, well sorted and old and so on.

8 So let me ask Bremner, a Bremner lawyer.

9 MR. GRADY: Good morning, your Honor. John Grady for
10 Bremner.

11 THE COURT: Mr. Grady. So for these paper documents
12 of some years ago, so is there some kind of index or what?

13 MR. GRADY: There is not.

14 THE COURT: Pardon?

15 MR. GRADY: There is not.

16 THE COURT: There is no index.

17 MR. GRADY: There is no index. They are contained in
18 sort of a historical group of boxes.

19 THE COURT: So these are in boxes. And how much is in
20 there, how many documents?

21 MR. GRADY: We -- it's hundreds of documents --
22 sorry -- hundreds of boxes.

23 THE COURT: Hundreds of boxes.

24 MR. GRADY: Hundreds of boxes spread across eight
25 different factories.

1 THE COURT: Now, so that was about six years ago or
2 so, or six to nine years ago?

3 MR. GRADY: Yes.

4 THE COURT: Okay. So have your recipes changed since
5 then?

6 MR. GRADY: I don't know that, your Honor. What I
7 know is this, however, and this may -- this may ease things.
8 We can give an estimate within a month or two of when
9 production began and when production ended for a given product.
10 I asked my client whether they might be able to stipulate to a
11 date certain within that range. And we are sort of thinking
12 about that and trying to.

13 But what we're dealing with here is not just we have
14 no idea when these things began and ended. We think we can
15 narrow it within a pretty narrow date range, so that it might
16 not be material what the exact date is. That would avoid
17 having to go to factories and through dusty boxes.

18 I am not sure that's been suggested to Ms. Noel. This
19 sort of came up yesterday in preparation for this motion. But
20 we have estimated a range for every product of dates.

21 THE COURT: When you say estimate, is this sampling
22 or --

23 MR. GRADY: It's based on memories of --

24 THE COURT: Memories of individuals.

25 MR. GRADY: Yes. And that's really what it is, Judge.

1 THE COURT: So they remember. They have a
2 recollection of how much of the different -- of the cookies
3 based on different recipes they sold? Is that --

4 MR. GRADY: They manufactured, yes.

5 THE COURT: They manufactured.

6 MR. GRADY: And the 30(b)(6) deposition, which is
7 coming up for my client next week, two days, could better
8 define their memory.

9 THE COURT: Ms. Noel, is that satisfactory?

10 MS. NOEL: Your Honor, Bremner and Topco present
11 perhaps the more complicated situation for us. And we have
12 heard varying stories what the problem in gathering and
13 producing this information is.

14 THE COURT: Now, is the concern just about the paper,
15 the paper records, or rather than the electronic?

16 MS. NOEL: No, your Honor, it's not. We have -- we
17 have been -- we have not been provided any detailed
18 manufacturing process documents, even for the recent years. We
19 have been provided some high-level mixing reports. But they
20 are clearly not the type of documents, in our estimation, that
21 one would actually use to manufacture the cookies.

22 So we, in part, want more specific documents even for
23 the last six years. We've been advised by Bremner and Topco
24 that that is too technical to be provided in interrogatory, and
25 we should conduct our 30(b)(6).

1 Without the documentation and without the narrative
2 response, it puts a -- particularly a seven-hour deposition, it
3 will be very logistically difficult. We believe they know how
4 they make their cookies. And we would request, if only for the
5 last six years, that they at least provide the more detailed
6 information on that.

7 We have asked for assurances on the dates, and we
8 would welcome a stipulation from them that we can rely on
9 certain dates associated with certain recipes. And we have
10 also recently received a representation from Bremner and Topco
11 that they will provide us the rest of the SKU numbers. And
12 that certainly will help us out quite a bit.

13 THE COURT: Are you looking for the same information
14 you want from Keebler and Conopco?

15 MS. NOEL: Ideally, your Honor, yes. And we believe
16 they must know that, at least for the last six years.

17 THE COURT: For the electronic, yes.

18 MS. NOEL: And we have repeatedly asked, you know, if
19 we have to go out to your facility, tell us which ones to go
20 to. Give us an idea of how many documents we are talking
21 about. And we've been repeated told, we don't know.

22 So we're not sure that an adequate investigation has
23 really been done into what the universe of these documents and
24 what these facilities actually have.

25 THE COURT: Well, now you are talking about the

1 documents, not the electronic era. So what is it you want them
2 to do with the documents?

3 MS. NOEL: Your Honor, we would ask for the same
4 relief that Keebler and Unilever is providing, at least for the
5 period the last six years.

6 THE COURT: That I understand, the last six years.
7 But for the paper, the paper era that preceded it.

8 MS. NOEL: For the paper era we'd expect that some
9 investigation take place by counsel with their client as to
10 really are there documents for the accused products really at
11 all eight facilities. We've heard varying answers from counsel
12 on that. And what is the universe? And how are these
13 documents stored? Are they just in a warehouse in boxes? And
14 we are going --

15 THE COURT: Well, he said they are in a hundred boxes,
16 or hundreds of boxes. He said they are in hundreds of boxes.
17 So what do you want -- what do you want them to do?

18 MS. NOEL: We want them to direct us to which facility
19 has the relevant hundreds of boxes.

20 THE COURT: Wait. I'm puzzled by that because with
21 the Keebler and Conopco, you want them to produce for you a
22 summary document, not the underlying documentation from which
23 it's based. Why isn't that what you want from Bremner?

24 MS. NOEL: It absolutely is what we want from Bremner.

25 THE COURT: So why do you want to look in those boxes?

1 MS. NOEL: Your Honor, we have been told that we're
2 not going to get a narrative answer, and it would be too
3 difficult for them to get it, and thus we should get it. We
4 certainly think it's appropriate that they provide us the
5 narrative answer, and we'd accept that.

6 THE COURT: I thought Mr. Grady said that they were
7 going to, you know, from their memory, best they could they
8 would provide an estimate.

9 Is that correct?

10 MR. GRADY: That's correct, your Honor. I want to
11 make sure that I understand what we're talking about because we
12 got date ranges on the one hand, and we got mixing information
13 on the other. When I was talking about the estimate, I was
14 talking about date ranges.

15 The subject of the mixing information, how the product
16 is manufactured, that's sort of something else that I haven't
17 addressed with the Court yet.

18 THE COURT: Well, what she -- as I understand it, what
19 Ms. Noel wants, you know, and Keebler and Conopco will provide
20 or have provided or in process of providing, is the recipe, the
21 sales of the cookies for each recipe, and in what period of
22 time, right? So can you provide that for either the electronic
23 period or the paper period that preceded it?

24 MR. GRADY: I believe we provided sales information.
25 I don't think that what's up this morning is anything to do

1 with sales. I think it's date ranges and mixing, from what
2 we're talking about right now. So the answer is --

3 THE COURT: By mixing, you mean the recipes?

4 MR. GRADY: We've given the recipes. We've given
5 ingredients.

6 THE COURT: What's mixing?

7 MR. GRADY: Mixing, they want to know what kind of
8 equipment is used in the mixing process.

9 THE COURT: So this is production, production.

10 MR. GRADY: Production, yeah.

11 THE COURT: That's what they want to have, right, be
12 able to figure out what production process was used for each
13 recipe.

14 MR. GRADY: Correct. And our challenge there, Judge,
15 unlike other manufacturers, which may have brand-new equipment,
16 we have a hodgepodge of used equipment that manufactures these
17 cookies. So the way that it's mixed for each different place
18 varies on the specific type of equipment.

19 And we don't have a book like we heard counsel talk
20 about before, the bible of production. We have individual
21 people who have learned these -- to use pieces of machinery as
22 they arrived on the factory floor. And then they are the ones
23 who sort of have the expertise to the level of detail that
24 counsel wants.

25 We've given ingredients, amount, order, method of

1 adding and combining. They now want to say sort of, well, is
2 it a right-hand turn or left-hand turn or something? But we
3 don't have that written down anywhere. That's in people's
4 heads.

5 THE COURT: Well, is that a problem? Why do you need
6 information at that level of detail?

7 MS. NOEL: I -- you know, I don't think it's quite at
8 the right-hand turn, left-hand turn level, your Honor. But it
9 is at the manufacturing level. We find it really hard to
10 believe that people show up to work every day in a factory, and
11 there is no written standard to make cookies that are sold in
12 stores all across America. We just -- we know they must exist.
13 It's not in one guy's memory in eight different plants. We
14 just frankly don't believe that.

15 Why we need the manufacturing process, again, is,
16 these cookies are made with margarines. And we strongly
17 suspect that when we put on our manufacturing and our various
18 liability experts and we say, here are the ingredients, here is
19 where they add, here is where they make a margarine or add a
20 margarine, they're going to say, no, that might be at factory
21 one through eight. Or, no, that's changed over time. Or, no,
22 we don't use any uniform process. You have to prove it for
23 each and every batch of cookies.

24 And if they're going to hold us to that offer of
25 proof, we need to have the information. And clearly they know

1 how they make their cookies.

2 MR. GRADY: This is exactly the kind of thing, Judge,
3 that can be asked in a 30(b)(6). I don't want to be in a
4 position of providing evidence with how my client does things.
5 But they're going to talk to him on Tuesday and Wednesday. If
6 they don't believe counsel, maybe they can ask the actual
7 clients and see how things are done.

8 THE COURT: Well, have you visited any of their
9 factories?

10 MS. NOEL: We haven't, your Honor, because we never
11 received confirmation of which factory contained which
12 information. And now we're hearing that there are no
13 documents, that's in people's heads.

14 MR. GRADY: No, that's with respect to mixing. The
15 date ranges are something else. The date ranges are in the
16 documents.

17 MS. NOEL: Fair enough.

18 With respect to mixing, how are they going to prepare
19 this 30(b)(6) witness for Tuesday on the manufacturing
20 processes and protocols for all eight factories if they can't
21 give us any documents or put in any narrative form for that
22 deposition so that we have a baseline and we know we're going
23 into with a deposition? How is that witness going to be
24 prepared?

25 They either have the information or they don't.

1 MR. GRADY: Judge, there is no documentation of the
2 kind she is describing beyond what we've produced. We produced
3 all the ingredients and what goes into it.

4 THE COURT: So there are actually no written
5 instructions for people in the plant as to how to make the
6 cookie?

7 MR. GRADY: Not to the level of detail that she's
8 talking about, which is how the ingredients are processed
9 before and during the manufacturing process. I mean, that's --
10 what she's talking about, I believe, goes to kind of maybe what
11 we're talking about before, which is whether something becomes
12 margarine or not. And we're just -- we are -- we don't have
13 that level of detail written down.

14 THE COURT: I don't understand. So what -- I've never
15 been in a cookie factory. But there must be written
16 instructions as to how the workers produce the cookie, right?

17 MR. GRADY: Well, we have produced, Judge, tables that
18 show ingredients, order, how mixed.

19 THE COURT: So what is it that's missing, Ms. Noel?

20 MS. NOEL: It's just -- it's about as high level as
21 Mr. Grady suggests.

22 THE COURT: What specifically would you be interested
23 in?

24 MS. NOEL: When they mix their oils, how do they do
25 it? When --

1 THE COURT: What do you mean, how do they mix the oil?

2 MS. NOEL: Do they make an emulsification, for
3 example.

4 THE COURT: Pardon?

5 MS. NOEL: Do they make an emulsification, for
6 example, of ingredients such that it constitutes a margarine.

7 Now, we looked through. In the most recent Bremner
8 production we have found documents where they have a consultant
9 instructing them on the accused vanilla wafers. One, never use
10 any liquid shortening. Always use cubed or rotated shortening.
11 The idea of liquid or rotated shortening isn't in their
12 manufacturing process that they've given us. Store the cubed
13 shortening at 60 degrees or cooler. Do not bring the entire
14 pallet and let it sit in the mixing room. Always maintain a
15 dough temperature at X degrees.

16 THE COURT: So that's the level of information that
17 you want?

18 MS. NOEL: Yes. What -- what do they tell the guys
19 who work on the floor? How do they make the cookies?

20 THE COURT: Yes, so it sounds like there would have to
21 be written instructions for what Ms. Noel just described.

22 MR. GRADY: Judge, we are told that there are not.
23 And I mean --

24 THE COURT: I don't believe it.

25 MR. GRADY: That's why --

1 THE COURT: I don't believe it.

2 MR. GRADY: Well, I will be --

3 THE COURT: I mean, that's very complicated. What,
4 you have some worker who memorizes that? Or he makes it up on
5 the spot? If he memorized it, presumably there would be a
6 document that he memorized.

7 MR. GRADY: There could certainly be a process by
8 which --

9 THE COURT: What she described, is that something --
10 what she just read, do you hire a worker and someone says,
11 well, this is what you do. And you don't give him anything to
12 read. You just tell him, you do this, you do that, you don't
13 do that. And he goes and does it? No. That can't be right.
14 It will be a disaster.

15 No one is going to remember that list of directions.

16 MR. GRADY: Judge, all I can tell you is what I am
17 being told by --

18 THE COURT: Well, I don't believe it. It is too
19 implausible. There have to be written instructions
20 corresponding to what she just read that are given to the
21 workers.

22 MR. GRADY: I would be happy to go to my client again.

23 THE COURT: Well, I am not satisfied with your client.

24 So do you want to go visit their factories and watch
25 them making this stuff and ask them whether there is documents?

1 Is that what you want to do?

2 MS. NOEL: Your Honor, if Topco and Bremner continue
3 to refuse to provide this information, we may be left with no
4 choice. We certainly with expert reports -- and we thank your
5 Honor for extending our expert reports by two weeks.

6 But with this time frame and with the fact that I
7 think we have 12 depositions in two weeks, including five on
8 Tuesday -- we have to take five 30(b)(6) depositions on Tuesday
9 and prepare expert report. If we have to go to eight different
10 factories, we -- we hope that your Honor --

11 THE COURT: Why do you have to go to eight? Why don't
12 you just go to one?

13 MS. NOEL: Because we have been represented, I think
14 counsel represented today, that they use a hodgepodge of
15 different manufacturing processes. If they will represent that
16 this is how it's done at -- in making their cookies, then I
17 just cannot believe they make their cookies in various
18 different ways.

19 We believe that they should be ordered to provide us
20 information. They'll provide what they provide. And to the
21 extent we find out later that there was further information, we
22 think sanctions should be appropriate.

23 THE COURT: You are regulated by the agriculture
24 department, aren't you?

25 MR. GRADY: Yes, we are, Judge.

1 THE COURT: And they actually let workers make food
2 without having any instructions?

3 MR. GRADY: Your Honor --

4 THE COURT: I don't believe that.

5 MR. GRADY: I don't think there are no instructions.

6 THE COURT: Well, where are the instructions?

7 MR. GRADY: I don't know whether the instructions are
8 oral or --

9 THE COURT: They can't be oral. You can't give
10 complicated oral instructions to people making food. That's
11 totally irresponsible.

12 MR. GRADY: We haven't --

13 THE COURT: What, you put them through some
14 memorization test, say, these are the instructions? You reel
15 them off. Now repeat them repeat back. Now repeat them.
16 Repeat them to me so I know you know them.

17 MR. GRADY: Your Honor, I would be -- what I would ask
18 is that --

19 THE COURT: I don't believe any of this.

20 MR. GRADY: If I can go back to my client --

21 THE COURT: You go back and you come back with the
22 written instructions. If there are no written instructions, I
23 am going to report you to the Department of Agriculture. You
24 are making cookies without instructing the workers in writing
25 as to how to make them. That's what you are telling me.

1 MR. GRADY: Your Honor --

2 THE COURT: I'll call up the Department of Agriculture
3 and say, it looks like this company is producing food in a
4 dangerous and irresponsible fashion.

5 MR. GRADY: Judge, I need to clarify for the record
6 that I have not represented to the Court that there are no
7 instructions.

8 THE COURT: You certainly have.

9 MR. GRADY: No, your Honor.

10 THE COURT: You have said there are no written
11 instructions. You are saying these oral instructions.

12 MR. GRADY: I have --

13 THE COURT: You just said that.

14 MR. GRADY: Respectfully, your Honor, we have turned
15 over --

16 THE COURT: You have said that the instructions are
17 oral. You have turned over the written instructions, but there
18 are oral instructions.

19 MR. GRADY: Your Honor, I said, there may be oral
20 instructions to get to the level of detail --

21 THE COURT: What do you mean there may be? Why don't
22 you know what there are?

23 MR. GRADY: If I could explain to the Court, we have
24 turned over a list of --

25 THE COURT: I don't care what you have turned over.

1 Why don't you -- why can't you answer my question? Are there
2 oral instructions which are not -- which do not have a written
3 counter-part? Are there workers who are being told how to make
4 this stuff without being given written instructions?

5 I don't believe that.

6 MR. GRADY: I can't answer your question, your Honor,
7 because I don't know.

8 THE COURT: Well, how are you going to find out? When
9 are you going to find out? When are you going to tell us?

10 MR. GRADY: I will find out. I will go back to my
11 office and immediately call my client. I will begin the --

12 THE COURT: You will submit an affidavit tomorrow,
13 describing the absence or the presence of written instructions
14 at all stages in the manufacture of cookies.

15 MR. GRADY: Your Honor, you're looking for my client's
16 affidavit, correct, not mine?

17 THE COURT: Pardon?

18 MR. GRADY: You are looking for my client's affidavit,
19 not mine, correct? I just want to clarify. You said, I will
20 submit an affidavit. You mean from my client?

21 THE COURT: Yes.

22 Look, if you are stonewalling, I am going to enter a
23 default judgment against you because I don't -- I don't
24 tolerate these tactics.

25 MR. GRADY: Your Honor, I am not engaging in any --

1 THE COURT: All this stuff about the eight factories,
2 you know what's going on, and everything is mixed up. I don't
3 believe any of that. It's not how -- I mean, this is a major
4 company. They don't -- they don't know what's going on in
5 factory to factory. What's the big deal about eight factories?

6 I want your affidavit to indicate why you are not able
7 to provide the same sort of information, the same sort of
8 information that Keebler and Conopco are willing to provide.

9 Okay. Well, thanks. Let me move on to something
10 else.

11 MS. NOEL: Your Honor, I am sorry to interrupt. There
12 is one more issue with related to Topco and Bremner that we
13 would like addressed.

14 THE COURT: No, I understand. Yes.

15 MS. NOEL: Topco is a separate --

16 THE COURT: Well, before you get to Topco --

17 MS. NOEL: On the same manufacturing process issue,
18 not --

19 THE COURT: But Topco does manufacture, right?

20 MS. NOEL: Well, that is what they have represented to
21 the Court, and we believe that they don't manufacture. We do
22 not believe that they don't have any documents regarding the
23 cookie formulas of the accused products or testing of same.

24 Topco has a quality assurance laboratory that tests
25 products and provides specifications to Bremner. We know that

1 from their product supplier agreement. We also know it from an
2 e-mail produced by Bremner.

3 So -- and if I may, your Honor, the e-mail is -- if I
4 can find it, is somewhat enlightening. It's Bates No. BREM
5 2823. It's an e-mail not from the manufacturer of Bremner to
6 Topco but from Topco's technologist quality assurance,
7 technologist in their quality assurance department, to Bremner,
8 forwarding to Bremner a comparison of the formulas that Bremner
9 currently has.

10 It also states, quote, as it stands right now, neither
11 formula of vanilla wafers is approved by Topco QA. It also
12 continues to reference the harmonization formula stands the
13 best chance but will be rejected both by Topco Q & A and our
14 other members when they learn of the score. It continues with
15 recommendation that they lower the saturated fat in the accused
16 product.

17 Now, we weren't produced that e-mail or anything like
18 it from Topco. In fact, I think Topco has produced less than
19 300 documents in this entire litigation. They have a
20 laboratory that tests the accused products. They have
21 information on formulas.

22 So we would ask that they be compelled to answer our
23 request for production of documents.

24 THE COURT: What documents are you looking for?

25 MS. NOEL: We are looking for, for example, any

1 testing or any commentary on the formulas used that can be --

2 THE COURT: What would be the relevance of the
3 commentary on a formula?

4 MS. NOEL: Well, if they are dissatisfied with a
5 formula that has trans fat in it, we want to know. Or if a
6 noninfringing alternative formula didn't pass the right test
7 because it didn't have the right taste or feel or customers
8 didn't like it, I am -- I'm making -- I'm surmising those
9 hypotheticals, your Honor, to be fair. I don't know any of
10 those are truth or fact.

11 But I don't believe they have no documents on
12 manufacturing of the accused products or formulation of the
13 accused products because this Bremner document seems to belie
14 it. And their product supplier agreement between Topco and
15 Bremner provides that Bremner warrants that all products
16 supplied thereunder will comply with Topco's product
17 specification, other product specification for the accused
18 products.

19 If so they haven't been produced. And it's been
20 represented to us repeatedly and to this Court that they have
21 no such documents. So we ask that that be --

22 THE COURT: Is the notion that these Topco documents
23 might show that Bremner was not using a particular recipe that
24 they said they were using or what?

25 MS. NOEL: No. For example, your Honor, if Topco is

1 insisting that Bremner use a formula that is infringing, that
2 would be highly relevant to the value of the infringing
3 formulation.

4 THE COURT: Well, this is getting into the marketing
5 area, consumer demand and --

6 MS. NOEL: It does, your Honor. And --

7 THE COURT: But how is it -- I thought you were saying
8 this was connected to the issue of the recipes used and how
9 many sales are associated with each recipe.

10 MS. NOEL: It would be responsive to those requests,
11 your Honor. It may have relevance in both pots.

12 THE COURT: Well, I don't know how it would -- I don't
13 understand how it would -- what light it would cast on the
14 question of what recipes Bremner uses and how much sales are
15 associated with each recipe.

16 MS. NOEL: It would perhaps, your Honor, corroborate
17 it. But your Honor has, I believe, granted us the relief from
18 Bremner. So to the extent it's duplicative, you know, perhaps
19 those -- that universe need not be produced for that purpose.
20 We think it's responsive and also highly relevant to the next
21 motion to compel as well.

22 THE COURT: The marketing.

23 MS. NOEL: The marketing.

24 THE COURT: Okay. Well, before we get to the
25 marketing, there is just one issue. You were asking for the

1 defendants' licensing agreements. Haven't you received them?

2 MS. NOEL: Your Honor, I think by now we have -- I
3 believe we have received assurances from all the defendants
4 that to the extent those documents exist, they have been
5 produced.

6 THE COURT: Okay.

7 MS. NOEL: And I can only rely on that representation.

8 THE COURT: So withdrew that.

9 So on the marketing front, so I found -- I found these
10 confusing. So I take it this is relevant to -- this bears on
11 damages. And the idea is to determine -- I would think the
12 idea is to determine how much the cholesterol-related features
13 in the recipe drive sales.

14 So I would think the way to look at it would be to see
15 how these -- well, I can think of two types of evidence. One
16 would be internal studies by the defendants in which they
17 compare the costs of using a particular recipe that has, you
18 know, low cholesterol with the anticipated benefit in
19 additional consumer sales, right? That will be logical form of
20 damage proof.

21 So that's one. So for that, you would want to know
22 how these products are marketed to consumers? So suppose that
23 when these cookies are sold, there is nothing on the package or
24 in any of the advertising that refers to cholesterol, that
25 would make it surprising that the infringement had any

1 consequences unless it saved money in production.

2 So shouldn't we be looking at the consumer marketing?

3 MS. NOEL: We do want them to produce their consumer
4 marketing.

5 THE COURT: Is that where Topco comes in?

6 MS. NOEL: That is in part, yes, your Honor, where
7 Topco comes in.

8 THE COURT: Actually, I don't know what Topco is.
9 Come to think of it. What is Topco?

10 MS. NOEL: I can defer to Mr. Grady. We are informed
11 that it's a consortium of stores that is specifically created
12 to maximize their purchasing power and to market. So the fact
13 that we haven't received --

14 THE COURT: So it's a buying coop of grocery stores?

15 MR. GRADY: I think that's correct, Judge. We
16 would -- we refer to internally as a reseller.

17 THE COURT: As a reseller.

18 MR. GRADY: Reseller.

19 THE COURT: They don't own the grocery stores, but
20 they supply them?

21 MR. GRADY: I believe that's correct.

22 THE COURT: Middleman.

23 And so you are interested in the market, in Topco's
24 marketing materials?

25 MS. NOEL: Marketing materials.

1 THE COURT: What they tell the grocery stores, you
2 know, buy this low cholesterol.

3 MS. NOEL: Internal studies, what they tell the
4 stores, what their sales information. You know, we don't even
5 have -- we are told the price lists don't exist. We are told
6 they have no traditional marketing. We keep telling them, we
7 don't know what you mean by the phrase, traditional marketing.
8 It sounds like jargon.

9 We're looking for any sort of marketing or
10 communications to assist your members to market these accused
11 products. We are told, nothing exists at Bremner or Topco. We
12 just find it hard to believe.

13 MR. GRADY: Judge, that's not quite right. There was
14 a meet and confer last Friday. We are looking at the type of
15 marketing materials we now understand that they want. I think
16 our initial response was, we are a private label. We don't go
17 out and market ourselves as a brand.

18 We then understood that they wanted the type of things
19 that you've been discussing, internal -- we are looking at that
20 right now. There was -- in fact, we committed over the phone
21 to produce those as soon as possible once we locate anything
22 that exists.

23 THE COURT: So what's the timetable on that?

24 MR. GRADY: Your Honor, I would say we would do
25 everything we possibly could to produce it by next Friday.

1 THE COURT: Is that satisfactory?

2 MS. NOEL: Your Honor, we would at the very least need
3 to then reschedule the 30(b)(6), which I believe is Tuesday.
4 There are three on Tuesday and one on Wednesday for the Topco
5 Bremner witnesses.

6 MR. GRADY: Your Honor, right know the search is going
7 on in another law office. So it could be that they already
8 uncovered it. Perhaps after Court I can talk with Ms. Noel and
9 we can deal with that.

10 THE COURT: Okay. That will be fine.

11 Now, Brandeis has a -- so let me just ask, does Topco
12 have -- does Topco have anything to do with the recipes? I
13 mean, were they specified at Bremner what kind of cookie they
14 wanted?

15 MR. GRADY: I don't know that, Judge.

16 THE COURT: So Brandeis so is requesting costs for
17 what exactly? What are you asking costs for?

18 You're asking for costs from Bremner and Topco, is
19 that correct?

20 MS. NOEL: You mean on this motion, your Honor?

21 THE COURT: On what?

22 MS. NOEL: On this motion? Or are you speaking of the
23 internal documents?

24 THE COURT: No. Well, I am confused.

25 What are you seeking in -- are you seeking information

1 about costs? Or you are seeking an award of costs? I am
2 puzzled.

3 MS. NOEL: Both.

4 THE COURT: Both. Okay.

5 MS. NOEL: Both. Two separate issues, your Honor. We
6 don't believe that the conduct of the defendants has been
7 appropriate in providing this information. We believe it's
8 been stonewalled for about 11 months. We believe costs should
9 be shifted for having to bring these motions.

10 On the issue with Bremner and Topco, you know,
11 certainly, their price lists for the products and their
12 marketing materials are all subject to the motion, if that's
13 what your Honor is referring to.

14 THE COURT: So this is a sanctions motion, rather than
15 seeking discovery of cost information. That's what --

16 MS. NOEL: Well, I believe it's both, your Honor. I
17 believe we have sought price lists for products sold, all their
18 marketing materials, their market and market share materials.
19 We have an understanding from their Website that they subscribe
20 to IRI, which does market summaries and studies on consumer
21 demand and commercial success. So --

22 THE COURT: Right. You want your -- well, this is
23 separate from -- you want their internal documents, their --
24 you would like ideally the study in which they said, well, if
25 we sell these low-cholesterol cookies, it will cost us X more,

1 but we will make Y more in sales, something like that? Is that
2 what you are looking for?

3 MS. NOEL: That would be information we would like.

4 THE COURT: So you must have that?

5 MR. GRADY: Your Honor, I can go back to my client and
6 confirm whether they have it or not. I don't know.

7 THE COURT: Well, wait a second. How do they decide
8 what cookies they are going to sell?

9 MR. GRADY: Are we talking about Bremner or Topco?

10 THE COURT: Bremner.

11 MR. GRADY: I would assume, Judge, there is
12 documentation internally that talks about this cookie is doing
13 great, this cookie is not doing great.

14 THE COURT: Not doing great. The question is, they
15 have to decide whether to make a low-cholesterol cookie. And
16 there is a cost involved, including a risk of an infringement
17 suit. There is a cost involved.

18 So presumably, there is some calculation of benefits.
19 How many additional sales will we get with we sell, if we tell
20 the retailers, this is great low-cholesterol cookie. And we
21 have the most obese population in the world with all sorts of
22 heart problems. So we will market it this way, and we will
23 hope to get, you know, X additional sales.

24 MR. GRADY: Any documents like that, your Honor, we
25 will produce.

1 THE COURT: There have to be documents like that.
2 Otherwise, I mean, you are giving me a picture of a totally
3 irresponsible, incompetent company, which doesn't have any
4 paper, does everything orally, like a pre-literate society
5 where people have really great memories because they don't have
6 any writing.

7 MR. GRADY: I am not sure I've done my job then,
8 Judge, because that's certainly not how I want to portray my
9 client.

10 THE COURT: So that's what they want. I will defer
11 action on this sanctions motion to see what Bremner and Topco
12 are able to produce.

13 Does Bremner have contracts with other customers?

14 MR. GRADY: Your Honor, except for Topco, everything
15 else is by purchase order.

16 THE COURT: Is by?

17 MR. GRADY: Purchase order. In other words, there is
18 no --

19 THE COURT: No ongoing arrangements, for example, to
20 Girl Scouts?

21 MR. GRADY: Correct.

22 THE COURT: Are there any other discovery problems
23 that we should talk about?

24 MS. NOEL: Plaintiffs have no other current issues,
25 your Honor.

1 THE COURT: Do the defendants?

2 MR. MANCINI: Your Honor, John Mancini on behalf of
3 defendant Keebler. There is one discretion issue which the
4 defendants may be filing a motion tomorrow. But perhaps since
5 we are here, we can avoid the necessity for that.

6 One of the inventors of the patent, individual named
7 Kalyana Sundrum, if I pronounce that correctly, the plaintiffs
8 actually submitted an affidavit by him in this case. We've had
9 some rather significant difficulties getting him confirmed for
10 a deposition.

11 And the motion was to seek to compel his deposition at
12 a very early date. He is a key witness in this case. There is
13 some dispute as to whether or not they have control over him.
14 We think that issue is beyond dispute since they produced an
15 affidavit from him in this case.

16 We were going to file a motion for that on Friday, per
17 the Court's motion schedule. But perhaps we can resolve that
18 today.

19 THE COURT: Ms. Noel?

20 MS. NOEL: Your Honor, Dr. Sundrum is a scientist in
21 Malaysia. We have been in communications with him. We did
22 obtain a declaration from him. We have also requested that he
23 provide us documents. We have also requested that he come to
24 the United States for a deposition.

25 He has agreed in principal to come to the United

1 States in a deposition. But his employer, with whom we have no
2 affiliation, has him traveling internationally.

3 THE COURT: Well, why don't you have a video
4 deposition of him? Why do you have to drag him to the United
5 States from Malaysia?

6 MS. NOEL: Your Honor, that was our understanding of
7 the defendants' request.

8 THE COURT: Why? What's that about? Why don't you
9 have a video deposition?

10 MR. MANCINI: Your Honor, we can certainly do it by
11 video, but we need the documents as well, your Honor.

12 THE COURT: Can't the documents be scanned and
13 e-mailed?

14 MS. NOEL: Dr. Sundrum has represented to us that he
15 has no documents, that any documents he had he left at his
16 former employer, the Palm Oil Institute of Malaysia, otherwise
17 referred to as PORIM. We have requested and he has told us
18 that he would earlier this month go to PORIM and request any
19 documents that they have.

20 We have had a very hard time getting ahold of Dr.
21 Sundrum in the last couple of weeks. As recently as last night
22 a call was made to him, and the line was lost. We don't have
23 an explanation for the Court of why that occurred.

24 We do know he has represented to us that he will be
25 traveling extensively for his job throughout the month of

1 October. We were targeting the month of November for his
2 deposition. We have -- we will now raise with him the
3 possibility of a video deposition. We have made, I can
4 represent to the Court, many, many attempts to contact Dr.
5 Sundrum. We want him to participate in this case. I don't
6 believe we control him.

7 I also will note that the defendants have never
8 subpoenaed him and only requested his deposition rather
9 recently, knowing he is in Malaysia. So we don't control the
10 man. We are taking every step we can to secure his
11 participation in the case. And we have made multiple requests
12 for documents.

13 But as I said, he said they lie with PORIM, which we
14 have no control over. But we have requested he request them
15 from them.

16 THE COURT: Can someone in Malaysia be subpoenaed?

17 MS. NOEL: There is an international treaty, I
18 believe. But I do not believe defendants have made any effort
19 to --

20 THE COURT: Invoke it.

21 MS. NOEL: -- invoke it.

22 MR. MANCINI: Your Honor, two-points. With respect to
23 the invocation of The Hague, they produced an affidavit from
24 him in this case, so we believe he has control. But
25 furthermore, he has a contract with Brandeis where he has

1 committed to providing documents and testimony requested by
2 Brandeis, their client.

3 This is going on for some time. All we ask is for a
4 date certain for the documents, date certain for the deposition
5 in sufficient time for our expert reports.

6 THE COURT: Well, that's a reasonable request. The
7 problem is, if this fellow is hard to deal with in Malaysia, I
8 don't know what exactly -- I don't know what I can do.

9 MR. MANCINI: Well, the point is, your Honor, Brandeis
10 clearly has control. When they wanted a declaration from him
11 they were able to obtain it in record time, file it in this
12 case. We are surprised that then they do not have control when
13 we need him for a deposition and produce documents. And so all
14 we --

15 THE COURT: I don't understand. How can Brandeis
16 control him? I don't understand.

17 MR. MANCINI: They have a contract with him where he
18 commits to provide documents and testimony. And they --

19 THE COURT: Is he breaking his contract?

20 MR. MANCINI: If he is not going to provide document
21 and testimony, I believe he is. But --

22 THE COURT: But then he is not -- then he is not in
23 Brandeis' control.

24 MR. MANCINI: Well, they produced a declaration.

25 THE COURT: He has broken his chains, is running wild,

1 8,000 miles away. So what am I supposed to do?

2 MR. MANCINI: Well, to the extent Brandeis does have
3 control, they would --

4 THE COURT: It doesn't have control.

5 MR. MANCINI: We think they do.

6 THE COURT: I don't understand that. If he doesn't do
7 what he is supposed to do contractually, that severs the
8 control, right?

9 MR. MANCINI: Well, it may. But it begs the question
10 how they got the declaration from him in this case. So all
11 that we're asking for is a date certain for documents and
12 deposition. We're willing to even take the deposition by
13 video. But we need it before the expert reports are due. Or
14 we need relief from the expert reports because he is so
15 critical.

16 THE COURT: Can you go to Malaysia and look for him
17 and track him down?

18 MS. NOEL: Your Honor, we are using -- we will make
19 every effort.

20 THE COURT: Do you have Malaysian counsel?

21 MS. NOEL: We have used Malaysian counsel, yes, but
22 not to force a deposition or anything the like. But we have --
23 we do have Malaysian counsel.

24 THE COURT: I don't know what you do if --

25 MS. NOEL: Your Honor, we certainly have an interest

1 in Dr. Sundrum participating as well. And we will certainly
2 make every effort to have his deposition take place. Now that
3 there is an agreement that it can be done by video, perhaps
4 that will get his little more participation.

5 THE COURT: Easier for him.

6 MS. NOEL: Yes. And we alternatively offered to
7 defendants and Dr. Sundrum that perhaps it would be easier for
8 everyone, in light of Dr. Sundrum's travel, that we meet in
9 Europe, where we understood he might be going.

10 But I mean to convey to the Court that we are
11 diligently seeking his participation. But as far as the
12 documents, what I can tell you is he has represented to us he
13 left them at PORIM. He has requested them from PORIM. If
14 PORIM gives them to Dr. Sundrum and we obtain them, we will
15 certainly produce them.

16 MR. MANCINI: And --

17 MS. NOEL: But, your Honor, you know, just because we
18 obtained a declaration from the man at the beginning of the
19 case doesn't mean we can force him to take a deposition. I
20 don't think that shows control.

21 The other thing is, you know, defendants as far as the
22 timing and expert reports, should have started the process of
23 this a long time ago.

24 THE COURT: Now, this declaration, is this something
25 that you would be using at the trial?

1 MS. NOEL: Your Honor, I am not recalling the context
2 of --

3 MR. MANCINI: I think the more serious issue is, they
4 will rely on the Sundrum study that they believe will establish
5 the cholesterolemic benefits of this alleged invention. And if
6 they can't produce him, then at minimum we would seek that that
7 be precluded from doing that. And that's why we need him,
8 because we know that they intend to rely on that study to prove
9 this surprising effect that they claim from their patent. But
10 they can't do that if they can't produce him.

11 To Ms. Noel's point, I think she misspoke. Perhaps
12 she wasn't involved in the meet and confers. We have been
13 asking and pressing for this for some time. We are starting --
14 and it came to a motion to compel.

15 THE COURT: Well, there are two questions. So the
16 first question is, assuming that Brandeis wants to use the
17 declaration in evidence, the first question is whether Brandeis
18 is hiding him, keeping him from being produced and subjected to
19 devastating cross-examination. That's the first issue.

20 The second issue is, if not, nevertheless should his
21 declaration not be admitted in the absence of opportunity for
22 cross examination? Does that make it like hearsay? So you
23 could argue. You could argue both those points right?

24 But there is nothing, nothing I can do to produce Mr.
25 Sundrum. So it will be important for Brandeis to be able to

1 show that it has made every effort in good faith to produce him
2 in one form or another, electronic or personal. And then you
3 will have to wrestle with the question whether the declaration
4 could be admissible in the absence of cross-examination.

5 MR. MANCINI: Just to be clear, your Honor, it's not
6 just the declaration, but their ultimate reliance, which we
7 expect, on a study that he did in 1995 to prove these alleged
8 effects. We believe they should not be allowed to rely on that
9 study if they don't produce him as a witness.

10 THE COURT: Well, that's the same point. The question
11 is, can the study be admissible when the author can't be cross-
12 examined.

13 MR. MANCINI: Correct, your Honor. That's my
14 clarification, both to declaration and the study. Yes.

15 THE COURT: That's certainly an arguable point. I
16 should think between now and the trial it would be possible to
17 get a cross-examination, well, a deposition which would be
18 equivalent, of Sundrum somewhere. You can always go to
19 Malaysia and cross-examine him, right?

20 MR. MANCINI: Your Honor, we will go wherever as soon
21 as they make him available. We just want to preserve our
22 right. If it's beyond the expert reports, we may need some
23 relief from the expert report dates.

24 THE COURT: Okay. That's fine.

25 Is there anything else we ought to discuss? I want to

1 say something about deadlines. You know, we have a trial date.
2 We have the deadlines for expert reports. I don't want to
3 grant any more extensions. I want to keep the thing on our
4 existing schedule.

5 So is there anything else you want to discuss, or
6 should we call it a day?

7 MS. NOEL: Nothing from plaintiffs, your Honor. Thank
8 you.

9 MR. MANCINI: Your Honor, if I may, you had invited
10 our clients, Keebler -- sorry -- Keebler, Famous Amos and
11 Murray, and Nestle to file motions for summary judgment in lieu
12 of the stipulation, per the Court's motion practice, which I
13 understand to be Friday and Monday.

14 Because they are motions for summary judgment, we
15 wanted to request -- we could file a motion for additional
16 pages. But since we are here -- some additional pages on each
17 of those motions. And we are -- we mean to keep them brief.
18 But your current order amounts to about five pages.

19 We were hopeful to extend that to about 20 because
20 they are motions for summary judgment.

21 THE COURT: Any objection?

22 MS. NOEL: No, your Honor. We actually read your
23 Honor's order a little differently, that since defendants
24 forewent the last opportunity to file this motion by a date
25 certain set by this Court, that your Honor has instructed the

1 parties that you will consider motions pursuant to the normal
2 motions briefing schedule on summary judgment, which we took to
3 be the summary judgment schedule in your order.

4 There is a specific opening response and reply
5 schedule. And we understood -- perhaps we presumed too much,
6 but we understood that the Court would not hold to the
7 five-page page limit for summary judgment.

8 THE COURT: That's fine. Sure.

9 MR. MANCINI: So we're clear, the normal briefing
10 schedule is Friday, Monday. It's not the dates that are
11 identified. That's what we understand the Court's order to
12 mean. Because we do intend -- these should not be here longer.
13 We do intend file quick summary judgment motions on behalf of
14 them and resolve those issue that the parties have already
15 stipulated to.

16 So we would hope to do that rather soon.

17 THE COURT: Okay.

18 MR. MANCINI: Thank you, your Honor.

19 MS. NOEL: Your Honor, we had understood that they
20 would come with summary judgment. I think we've heard of the
21 prejudice frankly that defendants have put us in in holding
22 back discovery. Your Honor has heard a little bit of the
23 deposition schedule defendants are putting us through. We have
24 expert reports.

25 We are not going to get another extension as your

1 Honor has stated. To add summary judgment into this mix right
2 now seems --

3 THE COURT: Burdensome.

4 MS. NOEL: It does seem burdensome.

5 MR. MANCINI: Your Honor, with all due respect, they
6 already stipulated to noninfringement. The only question that
7 we believe will be in dispute on these summary judgment motions
8 is to whether these entities should receive final judgments
9 pursuant to Rule 54(b). They stipulated to noninfringement to
10 all the other issues. We don't think this is going to be
11 burdensome at all for Ms. Noel and her colleagues.

12 THE COURT: So, Ms. Noel, you can have -- you can have
13 an extension to reply. Would that --

14 MS. NOEL: That would help, your Honor.

15 THE COURT: Okay. How much would you like?

16 MR. MANCINI: So for context, we expect that we would
17 file our motions next week, probably next Friday, your Honor.

18 MS. NOEL: Your Honor, if we could have two weeks
19 after opening expert reports are due.

20 THE COURT: When would that be? When would that be,
21 roughly?

22 MR. MANCINI: We don't think that works. That would
23 take it all the way out to November 21 for an opposition that
24 we would file on or about October 26. That makes it almost
25 essentially a month to reply to a motion that, again, they

1 stipulated to noninfringement. The only issue that remains in
2 dispute is whether it should be a final judgment.

3 THE COURT: Whether what?

4 MR. MANCINI: There should be a final judgment with
5 respect to these entities.

6 THE COURT: You mean a Rule 54(b) judgment?

7 MR. MANCINI: Correct, your Honor. We expect that
8 that will be the only issue in dispute in these motions for
9 summary judgment.

10 THE COURT: Now I am confused.

11 MR. MANCINI: Yes, so let me --

12 THE COURT: You submitted those motions, those
13 elaborate motions, for summary judgment and the references to
14 Rule 54(b) and all that. Is that --

15 MR. MANCINI: Yes. So let me reset the date. Per the
16 Court's order of October 4, because it was clear, based on the
17 Court's Markman ruling, Nestle USA and Famous Amos with respect
18 to all its claims, Murray Biscuit and Keebler with respect to
19 most of its claims, would not be infringing. The parties
20 agreed to stipulations and proposed orders.

21 Court in its most recent order said that those
22 proposed orders and stipulations were unnecessarily
23 contemplated -- complicated and asked the parties to move for
24 summary judgment.

25 Similarly in the October 4 order, the Court asked the

1 parties to move for summary judgment by schedule. We were to
2 file by October 9. They were to apply -- oppose by October 12.
3 Because the parties met and conferred and realized there was no
4 dispute about noninfringement, we did stipulations in lieu of
5 motions for summary judgment.

6 So the Court's most recent order of October 15 asked
7 us to renew those motions because it did not accept the
8 stipulation. Again, we don't think there is really anything in
9 dispute because we stipulated to noninfringement. The Court
10 under its powers deemed the proposed orders to be unnecessarily
11 complicated.

12 So we think that that goes to only the question of
13 finality because noninfringement has been stipulated to. And
14 the finality can be briefed in two pages each.

15 THE COURT: Finality what?

16 MR. MANCINI: Finality under in 54(b) we think is a
17 discrete issue that shouldn't take Ms. Noel and her colleagues
18 nor us more than a couple pages to brief. The question is
19 whether or not the summary judgment should be final for purpose
20 of appeal or not. That's really the only question that I
21 perceive to be in dispute between the parties.

22 THE COURT: What's the answer?

23 MR. MANCINI: So we believe, your Honor, with respect
24 to Nestle USA, because there are no remaining claims, that
25 answer is clear that there ought to be finality. And to the

1 extent that consolidation complicates the question as the
2 Court, your Honor --

3 THE COURT: So Nestle is out of the case. So does
4 this mean that Brandeis would want to appeal, or not?

5 MS. NOEL: Brandeis, your Honor, at this stage does
6 intend to appeal the claims construction.

7 THE COURT: I'm sorry, Brandeis what?

8 MS. NOEL: Brandeis would appeal at this juncture the
9 claims construction ruling, which is what triggered us under
10 our ethical obligations to stipulate to the dismissal. And
11 then the problem we have there, obviously the cases would have
12 to be deconsolidated. And then some of the defendants would go
13 up to the Federal Circuit while this case is still going on the
14 same patents, on the same issues.

15 We certainly could ask the Federal Circuit and in
16 light of judicial efficiency to stay that. I am not sure what
17 all of these actions are really going to get besides a lot more
18 time and expense on the parties. They will be suffering no
19 prejudice if they have a nonfinal order until this case is up.

20 And in the meantime, they will be subjecting Brandeis
21 either to be arguing in the Federal Circuit at the same time or
22 arguing for a stay of that appeal. If the cases remain
23 consolidated, then there should not be a final order. This
24 case should go up, if it ever does, to the Federal Circuit at
25 one time.

1 MR. MANCINI: Just two points, your Honor. With
2 respect to prejudice, again, I think Ms. Noel misspoke because
3 the stipulation spoke to this. The prejudice is, if the order
4 is not final, Nestle USA, for example, for which I think Ms.
5 Noel concedes there are no viable claims post the Markman
6 ruling, will be liable for damages between the time of the
7 nonfinal order and its potential reversal, which with all due
8 respect we don't think will occur.

9 So in that stipulation the parties accommodate for
10 that, and they waive the ability for -- to collect damages for
11 that interim period, which is why Nestle agreed to stipulate to
12 a nonfinal judgment.

13 But absent that, we need finality because we need to
14 know if we continue to sell these Tollhouse cookie doughs, we
15 don't subject ourselves to damages because we don't believe we
16 do. We don't believe they infringe based on the Court's
17 Markman ruling. So that's the first question.

18 As to the second question about the consolidation,
19 there is no good reason that Nestle USA shouldn't be
20 deconsolidated now. The case is over with respect to it. And
21 by the way, similarly with respect to Famous Amos and Murray
22 Biscuits. The case is over with respect to those entities. If
23 they are deconsolidated, then under 54(b) there is just cause
24 to enter a final judgment and have this issue appealed, if they
25 seek to appeal it.

1 THE COURT: If they what?

2 MR. MANCINI: If they seek to appeal.

3 The defendants do not. Defendants have received
4 noninfringement. We do not seek to appeal the Markman ruling.
5 But I take it that as Ms. Noel has represented they do.

6 THE COURT: So you would want to appeal.

7 MS. NOEL: Yes, your Honor, we would.

8 THE COURT: You have to appeal.

9 MS. NOEL: We would have to appeal and we'll be under
10 a time clock. And then we will be on two separate tracks
11 unless the Fed Circuit stays the Nestle, Famous Amos --

12 MR. MANCINI: Murray Biscuit.

13 MS. NOEL: -- Murray Biscuit, thank you, counsel,
14 appeal which, you know, I don't presume to know what the
15 Federal Circuit would do. My hope and expectation is they
16 would stay. So we are left in the same position. Or even
17 worse, they won't stay it. We'll be fighting the appeal and
18 litigating this case at the same time.

19 Counsel spoke to the prejudice, to the damages. They
20 have our stipulation.

21 THE COURT: Why don't I -- what's the objection to my
22 doing nothing?

23 MR. MANCINI: The objection, your Honor, is that there
24 are entities, Nestle USA, Keebler and Murray, that need some
25 finality since there are now stipulation of noninfringement.

1 They need some order indicating that the case is over with
2 respect to it, for several reasons. One, as I mentioned, the
3 potential for ongoing damages which we need to resolve. I
4 think the stipulation addressed it.

5 And I'm not suggesting, unless the Court is willing to
6 entertain this, that we go back to the stipulation because it
7 did address it.

8 The second is, they are public companies. They have
9 reporting obligations that the case is open. It should not be
10 open against them.

11 But primarily, most significantly is this risk
12 exposure for damages that should be resolved. The parties did
13 resolve it by stipulation. We understand, it was perhaps a
14 little bit complex. But we need to resolve it either by
15 stipulation or by motion practice.

16 THE COURT: Yell, I don't understand. Suppose
17 Brandeis -- suppose when the entire case is over and suppose
18 you guys, defendants, lose and appeal. And Brandeis appeals
19 the dismissal of Nestle. And suppose there is a reversal. And
20 so Nestle loses.

21 Well, there would be nothing wrong with Nestle having
22 paid damages for that period, correct?

23 MR. MANCINI: Well, there is in this respect, your
24 Honor: If there is a final judgment, Nestle can rest
25 comfortably that it can continue to sell these products

1 without --

2 THE COURT: No, it can't because there is an appeal at
3 the end of the --

4 MR. MANCINI: Yes.

5 THE COURT: There is going to be an appeal.

6 MR. MANCINI: But because it can reasonably rely on
7 the final judgment from the Court, it won't be liable for
8 damages from the time of that final judgment to reversal.

9 THE COURT: Wait, I don't understand. Is it because
10 Brandeis will have only 30 days to appeal?

11 MR. MANCINI: No, it's because under the law, because
12 of its finality with respect to the claims.

13 THE COURT: I don't understand finality when the order
14 is appealable.

15 MR. MANCINI: Yes, the law -- and I agree. It doesn't
16 make the most logical sense -- doesn't allow our client to be
17 relieved of a damage claim if it's a nonfinal judgment but does
18 allow us to be relieved of the damage claim if it is a final
19 judgment until it is reversed. It actually does make sense
20 because if it's a final judgment, the company, Nestle, can rest
21 comfortably that its products don't infringe and it can
22 continue --

23 THE COURT: But if there is a final judgment, then
24 Brandeis has to appeal.

25 MR. MANCINI: They have to appeal. So in the

1 stipulation what we agreed to do, Brandeis waived its right to
2 collect any damages should it be reversed between a nonfinal
3 judgment and an appeal. That's what the stipulation addressed
4 to accommodate this concern, which is why Nestle agreed, said
5 fine, we will take it as a nonfinal judgment as opposed to
6 final.

7 THE COURT: So you agreed to that?

8 MS. NOEL: We did, your Honor. But it was predicated
9 on it being a nonfinal judgment as opposed to a final judgment
10 and forcing us to go through --

11 THE COURT: So aren't you both in agreement?

12 MR. MANCINI: We are in agreement, your Honor.

13 THE COURT: So what's the problem?

14 MR. MANCINI: The only problem is --

15 THE COURT: Briefs.

16 MR. MANCINI: The only problem is, the Court declined
17 to enter the proposed order, asked --

18 THE COURT: Because it was so complicated. Can't you
19 write this up in a couple sentences?

20 MR. MANCINI: So perhaps that is the solution.

21 THE COURT: You two should get together and submit,
22 you know, one document with your agreement and make it very,
23 very simple. Okay. I am afraid to sign things I don't
24 understand.

25 MR. MANCINI: Understand, your Honor.

1 THE COURT: I don't know where they are going to lead.

2 MR. MANCINI: With Noel -- Ms. Noel's acceptance, I
3 believe we can do it and do that quickly and present proposed
4 orders. And these issues will be resolved.

5 THE COURT: Okay. Great.

6 Okay. Then I think we are all set. So thank you very
7 much. And we will be in further touch obviously.

8 (Which were all the proceedings had at the hearing of the
9 within cause on the day and date hereof.)

10 CERTIFICATE

11 I HEREBY CERTIFY that the foregoing is a true, correct
12 and complete transcript of the proceedings had at the hearing
13 of the aforementioned cause on the day and date hereof.

14

15 /s/Alexandra Roth

10/19/2012

16 _____
Official Court Reporter
U.S. District Court
17 Northern District of Illinois
Eastern Division

Date

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